Supreme Court, U.S.
FILED

(1) No. 94- 941631 APR 4 - 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF OKLAHOMA,

Petitioner,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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April 4, 1995

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

27 pp

QUESTIONS PRESENTED

In 1991 the Secretary of Commerce decided not to make statistically-based adjustments to the 1990 United States census. The court of appeals held that the Secretary's decision was a denial of constitutionally-guaranteed equal protection unless he could demonstrate that the decision was essential to further a legitimate governmental objective. Accordingly, the following questions are presented:

1. Whether the Court of Appeals erred in imposing upon the Secretary of Commerce the heightened burden of showing that the decision furthers a governmental objective that is legitimate and is essential for the achievement of that objective.

2. Whether the opinion of the Court of Appeals is inconsistent with *U.S. Department of Commerce v. Montana*, 503 U.S. 442 (1992), and *Franklin v. Massachusetts*, 505 U.S. ___, 112 S.Ct. 2767 (1992), and in conflict with *Tucker v. U.S. Department of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 407 (1992), and *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1217 (1994).

3. Whether the decision of the Secretary of Commerce is consistent with the mandate of Article I, §2, cl. 3 of the United States Constitution that "[t]he actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct."

LIST OF ALL PARTIES

City of New York
State of New York
City of Los Angeles
City of Chicago
City of Houston
Dade County, Florida
United States Conference of Mayors
National League of Cities
League of United Latin American Citizens
National Association for the Advancement of Colored People
Marcella Maxwell
Donald H. Elliott
John Mack
Olga Morales
Timothy W. Wright, III
Raymond G. Romero
Antonio Gonzales
Athalie Range
Jerry Alan Wood
Carolyn Sue Lopez
City of Atlanta
Maynard Jackson, individually and as the Mayor of the City of Atlanta
Florida House of Representatives
Florida State Conference
Miguel A. De Grandy
Willye Dennis
Mario Diaz-Balart
Dr. Charles Evans
Rodolfo Garcia, Jr.

Bollowy L. "Bo" Johnson
Alfred J. Lawson, Jr.
Willis Logan, Jr.
Johnnie McMillan
Alzo J. Reddick
Peter Rudy Wallace
T. K. Wetherell

Plaintiffs-Appellants

State of Texas
City of Phoenix, Arizona
State of New Jersey
State of Florida
City of Cleveland, Ohio
City of Denver, Colorado
City of Inglewood, California
City of New Orleans, Louisiana
City of Oakland, California
City of Pasadena, California
City of Philadelphia, Pennsylvania
City of San Antonio, Texas
City of San Francisco, California
Broward County, Florida
State of Arizona
City of Baltimore, Maryland
City of Boston, Massachusetts
City of Long Beach, California
City of San Jose, California
Los Angeles County, California
San Bernadino County, California
District of Columbia

Navajo Nation
State of New Mexico
City of Tucson, Arizona
Council of Great City Schools

Intervenors-Plaintiffs-Appellants

United States Department of Commerce
Ronald H. Brown, Esq., as Secretary of the United States Department of Commerce
Michael R. Darby, as Under Secretary for Economic Affairs of the United States Department of Commerce
Bureau of Census
Barbara Everitt Bryant, as Director of Bureau of Census
William J. Clinton, as President of the United States
Donald K. Anderson, as Clerk of the United States House of Representatives
Michael Espy, as Secretary of Agriculture
Donna E. Shalala, as Secretary of Health & Human Services
Henry Cisneros, as Secretary of Housing & Urban Development
Robert B. Reich, as Secretary of Labor
Federico Pena, as Secretary of Transportation
Richard W. Riley, as Secretary of Education

Defendants-Appellees

State of Wisconsin
State of Oklahoma

Intervenors-Defendants-Appellees

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STATE OF OKLAHOMA,

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v.

CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, the State of Oklahoma, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 8, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 34 F.3d 1114 (App. 1). The opinions of the United States District Court for the Eastern District of New York are reported at 822 F. Supp. 906, 739 F. Supp. 761, and 713 F. Supp. 48 (App. 46, 104, and 130, respectively). The decision of the Secretary of Commerce is published at 56 Fed. Reg. 33,582 (App. 146).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 8, 1994. A timely Petition for Rehearing With Suggestion of Rehearing In Banc was filed by Petitioner on September 20, 1994, and denied by Order dated December 12, 1994 (App. 453).[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, clause 1, United States Constitution:

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[1] The petition for rehearing filed by The State of Wisconsin was denied by Order dated January 4, 1995 (App. 449).

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .

Article I, Section 2, clause 3, United States Constitution:

The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; . . .

United States Code, Title 2, section 2(a):

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent

statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. . . .

United States Code, Title 13, section 141:

(a) The Secretary shall, in the year 1980 and every ten years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

United States Code, Title 13, section 195:

Except for the determination of population for purposes of reapportionment of Representatives in Congress among the several States, the Secretary shall, if he considers

it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

STATEMENT OF THE CASE

On November 3, 1988, the City and State of New York, the State of California, and several other cities, public interest groups, and individuals brought this suit to compel the Department of Commerce and the Bureau of the Census to make statistical adjustments to the 1990 United States census in order to reduce the undercount of the population, particularly minorities, anticipated by the plaintiffs. Jurisdiction was based on 28 U.S.C. §§ 1331, 1337, and 1361, as well as 5 U.S.C. § 702. The suit survived an early dismissal motion. *See City of New York v. U.S. Dept. of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989).

In 1991, then-Secretary of Commerce Robert A. Mosbacher issued his decision not to make statistically-based adjustments to the 1990 United States census. 56 Fed. Reg. 33,582. In reaching that conclusion, the Secretary applied guidelines that he had published (55 Fed. Reg. 9,838) following a court-approved stipulation between the parties to this litigation. *See City of New York v. U.S. Dept. of Commerce*, 739 F. Supp. 761, 769 (E.D.N.Y. 1990). The Secretary's decision not to adjust the census enumeration was upheld by the district court on the basis of the administrative record and the additional evidence presented at a lengthy trial. *See City of New York v. U.S. Dept. of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993).

The district court, applying an "arbitrary and capricious" standard under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), determined that the Secretary's decision was reasonable and supported by the record. The court relied, in particular, on the reasonableness of the Secretary's approach of focusing on distributive rather than numeric accuracy -- that is, while statistical adjustment would probably result in greater numeric accuracy for the nation as a whole, adjustment would not assure greater accuracy, and would probably result in greater inaccuracy, at the city or block level, the level at which the greatest effects of adjustment would be felt for intra-state redistricting and allocation of federal funds. 822 F. Supp. at 921-925.

The court of appeals reversed and remanded for further proceedings. 34 F.3d 1114 (2d Cir. 1994). The court determined that the arbitrary-and-capricious standard of review was inappropriate. Instead, the court looked to the reapportionment cases such as *Karcher v. Daggett*, 462 U.S. 725 (1983), to find a constitutional standard of review. Concluding that the equal protection and due process principles of "one person/one vote" required the Department of Commerce to make a good-faith effort to achieve census accuracy "as nearly as practicable," 34 F.3d at 1129, 1131, the court held that the Secretary's decision was subject to heightened scrutiny: Did the decision not to adjust further a legitimate governmental objective and was it essential to the achievement of that objective? 34 F.3d at 1116, 1131.

Judge Timbers dissented from the opinion of the court of appeals. 34 F.3d at 1131-1132. He concluded that the panel decision conflicted with two other circuit decisions,

City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1217 (1994), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S.Ct. 407 (1992), which had earlier rejected challenges to the Secretary's decision.

REASONS FOR GRANTING THE WRIT

The court of appeals adopted a standard of review inconsistent with the principles enunciated in *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992), and *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442 (1992).

The judgment of the court of appeals conflicts with the decisions of two other circuits, *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1217 (1994); and *Tucker v. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S.Ct. 407 (1992).

This case is important to the Nation as a whole. Finality of the 1990 United States census enumeration is undeniably important for a number of reasons. If the judgment of the court of appeals is not reviewed, and the matter is remanded for further proceedings, it will likely be near the end of the decade before the validity of the 1990 census results will be finally determined.

I. The Court of Appeals Adopted a Standard of Review Inconsistent with Precedent from This Court

The court of appeals determined that the decision of the Secretary of Commerce not to adjust the 1990 census results was subject to heightened equal protection scrutiny. The court said that "the federal government, no less than the states, is required to make a good-faith effort to achieve the Constitution's plain objective of equal representation for equal numbers of people." 34 F.3d at 1129. Accordingly, the court held that the Secretary had the burden to show that his decision not to adjust furthered a legitimate governmental objective and was essential to achieve that objective.

This heightened standard of review was derived from the apportionment cases such as *Karcher v. Daggett*, 462 U.S. 725 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); and *Wesberry v. Sanders*, 376 U.S. 1 (1964), in which this Court held that "as nearly as practicable" congressional and state legislative districts had to be mathematically equal in size. The court of appeals viewed the Secretary's decision not to adjust the census statistically to be equivalent to a denial of equal protection with respect to the fundamental right of equality of voting power, for which "[j]udicial standards [of review] are well developed and familiar." 34 F.3d at 1128 (citing *Baker v. Carr*, 369 U.S. 186, 226 (1962)).

The standard of review adopted by the court of appeals imposes a greater burden on the Secretary than required by the Constitution, which provides that the census

be conducted "in such manner as [Congress] shall by Law direct." U.S. const. art. I, § 2, cl. 3. The standard which has been used by this Court in other census cases, and which should have been used by the court of appeals, is whether the Secretary's decision "is consistent with the constitutional language." *Franklin v. Massachusetts*, 112 S.Ct. at 2777 (citing *U.S. Dept. of Commerce v. Montana*, 112 S.Ct. at 1426).[2]

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[2] In *Massachusetts*, this Court upheld the judgment of the Secretary of Commerce because her decision to allocate federal employees temporarily serving overseas, including military, to their "homes of record" in the census enumeration was "*consonant with, though not dictated by*, the text and history of the Constitution." 112 S.Ct. at 2778 (emphasis added).

The Court defined the constitutional standard of review to include whether the Secretary's decision was "consistent with . . . the constitutional goal of equal representation." *Id.* at 2777. The Secretary's allocation decision passed constitutional muster under this part of the test because the Secretary's decision "does not hamper the underlying constitutional goal of equal representation, but . . . actually promotes equality." *Id.* at 2778. Arguably, *Massachusetts*' use of this collateral standard of review addressed a different problem than the court of appeals confronted in this case. *Massachusetts* involved the allocation to a particular state of persons actually counted; the present case involves a proposed statistical adjustment which (based on a not-then-final analysis) would "add over 6 million unidentified people to the census by duplicating the records of people already counted while subtracting over 900,000 people who were actually identified and counted." App. 156. Representational equality is not really the issue here because the court of appeals' primary concern was the Secretary's failure "to achieve numerical accuracy as nearly as practicable," 34 F.3d at 1131, rather than distributive accuracy at the local level. Thus, it can be said, as the court of appeals observed in *Tucker v. Dept. of Commerce*, 958 F.2d 1411, 1418 (7th Cir. 1992), proponents of statistical adjustment "are not asking us to decree [representational] equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census

There can be no doubt the proposition that "as nearly as is practicable one [person's] vote in a congressional election is . . . worth as much as another's," *Wesberry v. Sanders*, 376 U.S. at 8, makes common sense and is morally right. Accordingly, this Court has recognized that "[t]here is some force to the argument that the same historical insights that informed our construction of Article I, § 2 in the context of intrastate districting should apply . . . as well" to questions of Congress' choices of how to conduct and use the data from the decennial census. *U.S. Dept. of Commerce v. Montana*, 112 S.Ct. at 1427.

Nevertheless, this Court has concluded that the principle of equality derived from the *first* clause of Article I, § 2 of the Constitution, relating to selection of representatives "by the People of the several States," does not translate neatly to construction of the *third* clause of Article I, § 2 of the Constitution, which requires that an "actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct." The constitutional constraints that each state must have at least one representative, that each congressman can represent no more than 30,000 people, and that congressional districts cannot cross state lines "inexorably compel[] a significant departure from the [one person/one vote] ideal . . . Accordingly, although 'common sense' supports a test requiring a 'good-

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headcount."

In any event, whether consistency with the goal of equal representation is part of the standard of review or not -- a matter which can be addressed on the merits -- it is clear that the standard of review adopted by the court of appeals is a substantially higher burden than the "consistent with" test of *Massachusetts*.

faith effort to achieve precise mathematical equality' *within* each State [cite omitted], the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole." *U.S. Dept. of Commerce v. Montana*, 112 S.Ct. at 1429.

In determining whether Congress' choices about how the census will be conducted and how the data will be used are constitutional, this Court has said that the "polestar of equal representation does not provide sufficient guidance to [identify] a single constitutionally permissible course. . . [Therefore, Art. I, § 2, cl. 3] delegate[s] to Congress a measure of discretion that is broader than that accorded to the States in the much easier task of determining district sizes within State borders. . . [Congress'] choice . . . commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Ibid.*(footnote omitted).

Likewise, the "polestar of equal representation does not . . . [define] a single, constitutionally permissible course," *ibid.*, for Congress' statutory delegee, the Secretary of Commerce, to follow. Article I, § 2, cl. 3 contains only two constitutional commands: (1) A census shall be conducted every ten years, and (2) the "actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct."

The Secretary met both constitutional commands. The census was conducted in 1990 in the manner specified by Congress, which had by law provided that the Secretary will take a decennial census of population "in such form and

content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a). Congress authorized the Secretary, "if he considers it feasible," to use "the statistical method of 'sampling' in carrying out" his census-related duties "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States." 13 U.S.C. § 195.

Congress has not directed that a statistical adjustment be made to the actual enumeration. Neither did the President, to whom the Secretary reported the unadjusted census count and who, in turn reported to Congress the number of representatives to which each state was entitled pursuant to 2 U.S.C. § 2a, direct as he could have that an adjustment to the actual enumeration be made statistically. Since neither the Secretary's decision nor the President's report is subject to review under the Administrative Procedures Act, and both are subject to review only as to their constitutionality, *Franklin v. Massachusetts*, 112 S.Ct. at 2773-2776, the sole issue is whether the Secretary's decision "is consistent with the constitutional language," *id.* at 2777 (citing *U.S. Dept. of Commerce v. Montana*, 112 S.Ct. at 1426).

Rather than determine whether the Secretary's decision was consistent with the constitutional language, the court of appeals imposed on the Secretary a heightened standard of equal protection review. This is a greater burden on the Secretary than this Court's decisions require, and the judgment of the court of appeals therefore warrants review.

II. The Judgment of the Court of Appeals Is in Conflict With Decisions from Other Circuits

Judge Timbers observed in dissent from the panel decision of the court of appeals that the opinion of the court conflicted with decisions in two other circuits, *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1217 (1994), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 407 (1992). The judgment of the court of appeals should be reviewed to resolve this conflict.

In *Tucker*, the court of appeals held that neither the census statutes nor the Constitution provide a judicially administrable standard by which the decision to adjust or not to adjust the census headcount could be measured. Affirming the dismissal of a complaint to compel federal officials to adjust the census statistically, the court concluded that even a demonstrated undercount or differential undercount in the actual enumeration did not invoke a judicial remedy, not because the issue was nonjusticiable, or because the political question doctrine barred the suit, or because the plaintiffs did not have standing, but because "Article I, section 2, clause 3 does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." 958 F.2d at 1418.[3]

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[3] Although *Tucker* does not speak in terms of the "consistent with the constitutional language" standard of *Franklin v. Massachusetts*, 112 S.Ct. at 2777 -- *Tucker* was decided before *Massachusetts* -- the rationale of the court of appeals' decision is implicitly the same as used by this Court. The court of appeals observed that compelling statistical

The court specifically rejected the idea, embraced by the court of appeals in the present case, that an administrable standard could be found in the reapportionment cases: "Equality of voting power is an administrable standard; . . [However, t]he plaintiffs are not asking us to decree equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount. . . The dispositive consideration in this case is that, though even fine points of statistical methodology can have real consequences, a case about statistical methodology is a case whose gears fail to mesh with any enforceable federal rights." *Id.* at 1418-1419.[4]

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adjustment might have some merit if the "suit were based on a concern with discrimination rather than innocent inaccuracy," 958 F.2d at 1418; but since the undercount about which the plaintiffs there complained "is not the result of an effort to reduce some group's representation or funding but is merely an accident of the census-taking process," *id.* at 1413, there was no departure from the non-specific constitutional directive about how the census should be taken. In other words, no adjustment would be "consistent with the constitutional language" because the Constitution did not contain guidelines for an accurate decennial census that would prescribe otherwise.

[4] The court of appeals did not see the demand for a statistical adjustment to be like apportionment: "Another difference between this case and the reapportionment cases is that the decennial census doesn't count just voters or even just people eligible to vote. In fact the undercount is concentrated among persons who either cannot vote (illegal aliens) or are unlikely to vote (a smaller fraction of poor than of affluent people vote). So this is not a case about depriving anybody of his right to vote or about diluting his voting power. If anything, the undercount enhances the political power of voters relative to that of nonvoters, by making their numbers decisive (or more decisive) in the apportionment of congressional representatives and other political benefits." 958 F.2d at 1418.

In *City of Detroit*, another panel in a different circuit arrived at the same result as *Tucker*. Observing that the plaintiffs' arguments in favor of a statistical adjustment in census figures for all or part of the State of Michigan came "close to arguing that [Article I, § 2, cl. 3 of the Constitution] creates a constitutional right to census accuracy," 4 F.3d at 1375, the court nevertheless concluded that disagreement with the Census Bureau's statistical methodology was not ground for judicial intervention: "Plaintiffs cannot seriously be arguing that a perfectly accurate count of upwards of 250 million people (or nine-plus million in Michigan) was feasible, and nothing in the Constitution compels such an accurate result." *Id.* at 1377. The court, citing *Tucker*, held that a claim for statistical adjustment "invokes no judicially administrable standards." *Id.* at 1378.

The decisions of the Sixth and Seventh Circuits, which both concluded that disagreement with the methodology of the census did not give rise to a constitutional claim, are in conflict with the decision of the court of appeals in this case, that disagreement with the methodology of the census gives rise to an equal protection claim requiring heightened scrutiny of the administrative decision not to adjust the headcount. The judgment of the court of appeals should be reviewed to resolve the conflict.

III. This Case Is of National Importance

The 1980 census spawned over fifty lawsuits, many of which challenged that enumeration on the ground that it

undercounted certain groups. See *Carey v. Klutznick*, 653 F.2d 732, 735 n.10 (2nd Cir. 1981). Despite the efforts of the Census Bureau to develop methods to reduce the undercount, *see generally City of New York v. U.S. Dept. of Commerce*, 822 F. Supp. 906, 913-914 (E.D.N.Y. 1993), the 1990 census in turn spawned this suit and others, not the least of which were the *City of Detroit* and *Tucker* cases and the actions which resulted in the *Massachusetts*[5] and *Montana* decisions from this Court.

Because of this litigation, the 1990 census results remain uncertain, despite the fact that the Secretary of Commerce timely reported the census count to the President, and the President reported to the Congress the number of representatives to which each state was entitled as required by 2 U.S.C. § 2a. *See Commonwealth of Massachusetts v. Mosbacher*, 785 F. Supp. 230, 233 n.1 (D.Mass. 1992).[6] If the judgment of the court of appeals is not reviewed, further proceedings will be conducted in the district court to

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[5] The Court's opinion in *Massachusetts* began with the observation that "[a]s one season follows another, the decennial census has again generated a number of reapportionment controversies." 112 S.Ct. at 2770.

[6] Reversed *sub nom. Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992). As a result of these reports, the number of Representatives to which each state is entitled during this decade has already been fixed, and congressional elections have been conducted in 1992 and 1994 for seats in districts determined by the unadjusted census count. "If the adjusted count indicated by the [Post Enumeration Survey] were adopted, Arizona and California would each gain a seat in the House of Representatives; Wisconsin and Pennsylvania would each lose one seat," 34 F.3d at 1122, and the boundaries of congressional districts in most other states would likely be altered as well.

determine whether the Secretary's decision not to make statistical adjustments to the 1990 census was essential to the achievement of a legitimate governmental objective. Regardless of the district court's determination, further appeals will likely follow. In all probability, it will be approaching the end of the decade -- and another decennial census -- before the 1990 census results are finally determined.[7]

Statisticians agree that the census headcount can be adjusted; they do not agree whether it can be done accurately and fairly, because "'[t]here is no perfect truth as to the size and distribution of the population.'" *City of New York v. U.S. Dept. of Commerce*, 822 F. Supp. 906, 917 (E.D.N.Y. 1993)(quoting Dr. Barbara Bryant, Director of the Census).[8]

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[7] One can envision a nearly endless process of litigation. If, for example, the district court determined that a decision not to adjust did not further a legitimate governmental objective, would it then order an adjustment? And if it did, would not the current Secretary's judgment regarding the method of adjustment and his numerical determinations then face court challenges by the relative "losers" in the process? Or, if the Secretary's decision were upheld under a heightened level of review, would not the district court's judgment again be subjected to appeal? In some respects, *any* finality to the 1990 census adjustment question is difficult to envision, unless this Court determines that the Secretary's decision not to make statistical adjustments is consistent with the Constitution and no further review is required.

[8] Dr. Bryant's truism serves to highlight another problem with the court of appeal's choice of a standard of review. If the "true" population of the nation or any of its subdivisions cannot be precisely determined (because of both inaccuracies in counting and shifts over time in the counted population), what is the legitimate governmental objective to be achieved by a decision regarding adjustment? The court of appeals did not define one, other than to speak generally of representational equality

Courts agree that the census headcount can be adjusted; they do not agree whether the law compels that the effort be made, or what legal standard is to be used to gauge the results. *Cf. City of New York v. U.S. Dept. of Commerce*, 34 F.3d 1114 (2nd Cir. 1994), *with City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir. 1992).

The best hope for finality of the 1990 census results (as well as guidance for the planning of the next decennial census) rests in the review by this Court of the court of appeals' decision in this case. This case is therefore of national importance.

CONCLUSION

The court of appeals held that the Secretary of Commerce's decision not to make statistical adjustments to the 1990 census should have been subjected to heightened judicial review under an equal protection test derived from the apportionment cases. In doing so, the court of appeals adopted a standard inconsistent with the principles enunciated in *Franklin v. Massachusetts* and *U.S. Dept. of Commerce v. Montana*, and in conflict with decisions in two sister

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as nearly as practicable, but if that is the legitimate governmental objective, it seems to be a moving target that no adjustment decision, for or against, could essentially achieve. And, presumably, the courts would be faced with another round of legal challenge to the current Secretary's definition of the governmental objective, even before addressing whether the decision not to adjust would be essential to achieve it.

circuits, *City of Detroit v. Franklin* and *Tucker v. Dept. of Commerce*.

This is a case of national importance because it involves the degree and measure of the judicial role in the census taking process.

For all of these reasons certiorari should be granted so that this Court can define the standard by which courts are to review the constitutionality of the Secretary's decisions about the census, in light of the command of Article I, section 2, clause 3 that the "actual Enumeration shall be made . . .in such Manner as [Congress] shall by Law direct."

The State of Oklahoma respectfully requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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